Honorable Gary Locke
Governor
State of Washington
Legislative Building
Olympia, WA 98507

4-28-97

Re: HB 1866 - "Environmental Excellence"

Dear Governor Locke:

We are writing to urge that you veto HB 1866, the so-called "Environmental Excellence Bill." While People for Puget Sound sees real merit in some of the basic concepts behind this bill, we feel that, as currently written, it does not safeguard public health or the environment, nor does it provide a meaningful way for the public to be involved. For those reasons, we view it as, potentially, the most damaging legislation that we have worked on this session. We believe that, while there is an opportunity to bring all the interested parties together and create "win-win" solutions in this area, this bill, if enacted, would create more division among the parties. It will likely generate more law suits than it will cooperation among various interest groups.

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The approach outlined in HB 1866 is fundamentally different than the approach taken by the federal government under "Project XL." It is also less protective than alternative regulatory programs developed in other states, such as Minnesota. Both the federal and the Minnesota programs, contain far more protections and limitations on projects. Project XL requires "better than existing results be achieved" and, significantly, does not override existing statutory protections. The Minnesota law contains a consensus approach to decision making and is more narrowly drafted. Both are pilot programs. While allowing for creativity and regulatory flexibility, these programs maintain basic safeguards and process. While not perfect, these programs provide a better model for our state than what is outlined in HB 1866.

Reducing Existing Human Health and Environmental Safeguards:

To begin with, *this bill does not guarantee that, in developing agreements, industry sponsors will be held to the same level of protection provided under current human health and environmental standards.* We feel that a firm "bottom line" needs to be established and that Section 3 of HB 1866 provides only partial protection. For example, while this section requires that agreements meet some "ambient" water quality standards, it is not clear what is meant by points of compliance "established pursuant to law." This bill overrides all existing laws, including RCW 90.48 which defines points of compliance. In other words, there is no assurance the point of compliance will be anywhere near the discharge, making the requirement of meeting ambient standards meaningless. While we can understand the need to examine technology-based standards (i.e.-those standards which specify a specific technology or process be used at a facility) we see no reason why we should allow agreements to violate numeric standards, which are basic safeguards for the protection of human health and the environment. Instead, we should be looking at creative ways to achieve compliance with the numeric standards. This type of "performance standard" approach, looking for cost-effective ways to achieve better results, should be a firm requirement of all these projects.

While Section 3 suggests that the facility will achieve "better overall" results, we are concerned that this language takes us into the realm of pollution trading. Unfortunately, it is often very difficult to gauge what is better overall; there are few established methodologies in this area. Under these circumstances, the possibility of transfering risk to a nearby community is increased.
We also object to the fact that *HB 1866 does not require that the project achieve superior results*. This is a requirement of the federal XL program, and one of the principle reasons EPA officials will not support HB 1866. The bill claims to achieve "environmental excellence," but Section 3 clearly allows for projects which may simply achieve the status quo while reducing costs for the sponsor. The primary concern here is that, for the most part, the agreements will deal with experimental approaches which are not well understood: experimental technology, experimental processes, or approaches such as pollution trading. While these approaches are guaranteed to save the sponsor money, the public has little assurance that the project will meet environmental and public health goals. Requiring "superior" results, substantially better than the status quo, gives us some margin of safety should the experiment fail, as they often do. In addition, we feel that this approach is more equitable, a quid pro quo---everyone, hopefully, would benefit from the experiment.

Lack of Meaningful Public Involvement:

This bill creates a situation where the coordinating agency and the project sponsor can establish an agreement which may violate basic environmental protections and which would overturn standards and procedures which were the subject of, in many cases, years of negotiations between environmental and business interests. In short, this bill, by overriding existing statutes and regulations, allows the agency and the sponsor to create new public policy. We are not aware of any precedent for this type of arrangement in state or federal law. It is questionable whether this approach is even constitutional. What ever the case, we believe very strongly that under these circumstances there needs to be a higher level of public involvement than what is normally called for.

We believe that environmental and community leaders should be at the table as equals in the development of these agreements. This is the approach taken by Minnesota when they developed similar legislation. Although not the approach outlined under Project XL, that program, as noted above, is very different from the one outlined in HB 1866. One of the most significant differences being that XL, established by executive order, does not override existing statutes and allow the creation of new policy.

Section 6 of the bill, regarding public involvement, is vague and does not even require that public hearings be held, let alone the type of process suggested above. The provisions do not guarantee anything more than a notice and comment approach, which is simply unacceptable. Many critical decisions are made prior to the development of a draft agreement which would be difficult to correct once it is released for comment. Key information on the operation of the facility may not be available to the public in a notice and comment procedure, making it difficult for them to comment intelligently on the proposal.

Quite frankly, we are concerned that the closed-door negotiation sessions between the Department of Ecology and the business community which lead to

the creation of this bill will be replicated when it comes time to develop agreements, if not by Ecology, then by other coordinating agencies. Once agreements are reached between the agency and the project proponent, public comment will be less meaningful.

We also believe that a system of public involvement grants, similar to those issued by the EPA, the PIE Grant Program, or the MTCA Program are essential to the success of any program. The issues involved in these agreements are likely to be extremely complicated, and without technical support, the public will not be able to be meaningfully involved. This is especially true given that this is not a pilot program; the limited technical resources available to such communities now will be over extended by the volume of proposals.

Finally, we disagree that this approach should be applied on a programmatic level. Programmatic decisions are tantamount to rulemaking and legislative action. A programmatic decision should either be developed as a statute or, when permissible, as a rule. Under both rulemaking and legislative process there is extensive opportunities for public involvement, which are not provided for under the process outlined in Section 6 of 1866.

Scope of 1866

Another significant problem with the bill is that it attempts to create a program which over-arches 10 major environmental laws at the state, regional, and local levels. From our standpoint, one size does not fit all. Public participation processes under the Shorelines Management Act, for example, are quite different than those under state clean air laws. Standards and levels of protection are different, as are the resources which are being protected. Like other "regulatory reform" bills, the end result is a confusing bill which will likely generate a great deal of confusion and litigation as well as some unintended consequences.

The bill is written largely to address industrial facilities, particularly in relation to air and water quality issues. Throughout the bill, there are references to "facilities" and "operations." How will this language be applied to dock construction under the Shorelines Management Act or a Hydraulics Permit relating to a timber harvest? The language of the bill simply doesn't make sense when applied across the board. The few safeguards inserted into Section 3, for example, do not directly apply to problems relating to habitat. This flaw reflects poorly on the entire bill---it is clearly not a well thought out proposal. After questioning several of the key proponents of the bill, we were shocked to discover that no one could explain why the Shorelines Management Act was included in the bill or what type of regulatory flexibility might be required in that area.

Not only are the number of laws and the conflicts among these laws a problem, but the sheer number of proposals could be a additional problem. This program should be conducted with a set number of pilots. We believe that the Department of Ecology and other agencies will be inundated with proposals. The agency's ability to research these proposals given recent budget cuts is questionable. The limited start up money in the budget will not allow for much review by program staff. Nor is there money for review of local decision

making in this area (where fees go to the local government). Despite the fee authority, we believe the agencies could be stretched thin during initial review.

Moreover, as stated above, a large number of projects will make it impossible for environmental groups to play a meaningful role in the discussions.

Judicial Review, SEPA, and Termination:

The bill has additional problems when it comes to some of the procedural issues surrounding termination and appeal of agreements.

First, with regard to termination of an agreement in a situation where there is significant harm to the environment or a nearby community, the coordinating agency has authority under Section 11(4) to impose "practical interim requirements" and a compliance timeline to prevent additional harm. The problem is that *the interim requirements cannot be implemented until they are no longer subject to judicial review*. This means there will be a significant period of time, in the neighborhood of 2 years, during which these public health or environmental problems cannot be addressed. This is a serious flaw which could also create significant liability problems for the state.

Section 10 on judicial review sets up a process which is very different and less meaningful than the appeal processes established under current law. To begin with, appeal of an agreement goes directly to superior court instead of the normal administrative appeals board (e.g.- Pollution Control Hearings Board). The administrative appeals boards have the expertise in these areas to make good decisions on the technical issues which are sure to arise under these appeals. In addition, these appeals take, on average, four times as long as a similar appeal to an administrative appeals body Moreover, Section 10 requires that the court give "substantial deference" to the agency decision, which essentially eliminates any meaningful attempt to challenge an agreement.

Finally, Section 15 creates an exemption for these agreements from SEPA review. We strongly object to this provision. SEPA is the cornerstone of our environmental laws, insuring that adequate consideration of environmental impacts has occurred. Given the experimental nature of these projects, we can think of no better place to perform this type of review.

Thank you for reviewing our comments on this bill. Please feel free to contact us if you have questions or require additional information.

Yours,

Kathy Fletcher

Kathy Fletcher
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People for Puget Sound